No. 10,809

United States Circuit Court of Appeals

For the Ninth Circuit

LAWRENCE W. BRADY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

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No. 10,809

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LAWRENCE W. BRADY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

JURISDICTIONAL STATEMENT

This is an appeal from a judgment of conviction by the Southern Division of the United States District Court for the Northern District of California. The offenses charged in the indictment are violations of the Jones-Miller Act, 21 U.S.C. 174 and are punishable by imprisonment for a term exceeding one year. This Court has jurisdiction under the provisions of 28 United States Code, Section 225, subdivision (a), First and Third and subdivision (d).

No. 10,809

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BRIEF FOR APPELLANT

OFFENSES CHARGED, PLEA AND OUTCOME

Appellant was charged in an indictment, jointly with his wife Margaret Brady, in two counts with violations of the Jones-Miller Act, to wit, the unlawful concealment and transportation of narcotics, namely, heroin (T.R. 2). Two trials by jury were had; the first trial ended in a disagreement (T.R. 11); upon the second trial appellant and his wife were found guilty on both counts of the indictment (T.R. 17). After motions in arrest of judgment and for new trial were denied (T.R. 18) appellant was sen-

tenced to imprisonment for a term of three years and to pay a fine of $1000 on each count, the sentences to run consecutively (T.R. 19), whereupon appellant filed his notice of appeal (T.R. 22); the other defendant, appellant's wife, has not appealed, but is presently serving a sentence imposed by the Court. By order of this Court appellant was admitted to bail pending appeal (T.R. 193), said bond having been posted (T.R. 194).

THE FACTS

Briefly, the facts of the case are:

Agents of the Federal Bureau of Narcotics, having known appellant and his wife prior to April 4, 1944, on said date about six o'clock in the evening observed appellant drive his Cadillac automobile into a public garage at 840 Sutter Street, San Francisco. Appellant immediately left the garage and entered the Commodore Hotel across the street where he resided, and in about fifteen minutes came out of the hotel with his wife, re-entered the garage and drove out in his automobile. The agents followed appellant to Van Ness Avenue and Lombard Street where Mrs. Brady left the car and remained standing on the street corner for about five minutes while appellant was seen to drive several blocks further down Van Ness and return to pick up his wife and drive back to the same public garage on Sutter Street. As the agents drove into the garage behind appellant, Mrs. Brady got out of appellant's car and started to walk out of the garage. As she passed the agents' automobile, a small package was seen

to drop to the floor of the garage, apparently from the folds of her clothing. When first seen by the agents the package was in the process of falling (T.R. 39-41; 66-68).

The agent did not see the package in Mrs. Brady's hands, but could only see a package dropping towards the floor of the garage from the side of her clothing. He picked up the package from a position of between four and six inches from her feet (T.R. 54). He did not know what was in the package until he opened it and examined its contents (T.R. 62).

While one agent was picking up the package and placing Mrs. Brady under arrest, the other two agents in the automobile went to the rear of the garage and placed appellant under arrest (T.R. 68). When the first agent apprehending Mrs. Brady picked up the package, he shouted to the other two agents in the rear of the garage: "I have it" (T.R. 62 and T.R. 68). Both appellant and Mrs. Brady denied knowledge of the narcotics (T.R. 68). Appellant was then taken to his room in the Commodore Hotel across the street, the room was searched by the agents and appellant was also searched. However the agents did not find any narcotics on appellant's person, in his room or among his possessions (T.R. 69). The agents testified to conversations had both in appellant's hotel room immediately after his arrest (T.R. 70), and in the office of the District Supervisor several hours later in the evening (T.R. 71-72) wherein appellant is alleged to have admitted the purchase of the narcotics picked up in the garage and having paid $300 for the same.

Both appellant and his wife testified. Appellant claimed that he drove out to Van Ness Avenue and Lombard

Street with his wife so she could look at an apartment. Dropping her off at the corner he went on a few blocks to find a place to have the hood of his car fixed (T.R. 132-134). When he returned to the garage appellant was in the act of attempting to fix the hood himself when the agents stepped up and placed him under arrest (T.R. 134-135; 80-81). Appellant was handcuffed (T.R. 136). Appellant denied admitting ownership and purchase of the narcotics (T.R. 139).

Irving Cowan, produced as a witness by appellant, testified that he observed someone other than appellant and appellant's wife throw the package into the garage from a position on the runway to the basement and flee (T.R. 123-124).

In rebuttal witnesses, a doctor (T.R. 161) and a nurse (T.R. 174), produced by the prosecution, testified that appellant and his wife were hospitalized in a sanitarium shortly following their arrest; their ailments were diagnosed as drug addiction and they were given treatment for the same.

STATEMENT OF POINTS RELIED ON

Appellant raises four main points as alleged errors as follows:

1. **Insufficiency of the evidence to sustain the verdict.**

   (Paragraphs numbered 1, 2, 3 and 4, Assignment of Errors (T.R. 30); paragraph numbered 14, Assignment of Errors (T.R. 32).)

2. **The arrest and subsequent seizure were illegal.**

(Paragraphs numbered 7, 8, 9 and 10, Assignment of Errors (T.R. 31).)

3. **The trial court erred in admitting documentary and oral evidence concerning the hospitalization and treatment of appellant and his wife.**

(Paragraphs numbered 11, 12, 13 and 16, Assignment of Errors (T.R. 31-33).)

4. **The trial court erred in admitting in evidence the extra-judicial admissions and statements of appellant and his wife.**

(Paragraph numbered 15, Assignment of Errors (T.R. 32).)

ARGUMENT

FIRST POINT RAISED: INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN THE VERDICT

That the verdict is contrary to the evidence adduced at the trial herein (Paragraph 1, Assignment of Errors, T.R. 30).

That the verdict is not supported by the evidence in the case (Paragraph 2, Assignment of Errors, T.R. 30).

That the evidence adduced at the trial is insufficient to justify said verdict (Paragraph 3, Assignment of Errors, T.R. 30).

That said verdict is contrary to law (Paragraph 4, Assignment of Errors, T.R. 30).

That the Court erred in denying defendant's motion made at the close of plaintiff's case, for a directed verdict of acquittal on both counts of the indictment, for the reason that the legal evidence as a matter of law was insufficient to support a verdict of guilty (Paragraph 14, Assignment of Errors, T.R. 32).

The facts do not connect appellant with the alleged offense; it was not shown by the evidence that appellant possessed or transported or had knowledge of the package or its contents allegedly found by the agents on the floor of the garage. At the time the agents claimed they observed the package dropping at the feet of Mrs. Brady, Mrs. Brady was near the entrance of the garage on her way out and appellant was at the rear of the garage fixing the hood of his automobile. At no time was appellant seen in possession of or near the package. No evidence was offered from which knowledge of the package or its contents can be imputed to appellant.

There must be an intentional participation in the transaction with a view to the common design and purpose before a party can be guilty of crime.

Nuennemacher v. U. S., 27 Fed. Cas. No. 15902;
U. S. v. Lancaster, 44 Fed. 896;
U. S. v. Newton, 52 Fed. 275.

Guilty knowledge is a necessary element of proof which is lacking here.

Pettibone v. U. S., 148 U.S. 197;
Ezzard v. U. S., 7 Fed.(2) 808;
People v. Long, 7 Cal. App. 27;

People v. Kennedy, 21 Cal. App.(2) 185;
People v. Zoffel, 35 Cal. App.(2) 215;
People v. Rodriguez, 37 Cal. App.(2) 290;
People v. Tom Woo, 181 Cal. 315.

It must be shown that the defendant had knowledge of and participated in the alleged unlawful act. Circumstances merely arousing suspicion of guilt are insufficient. Knowledge of the unlawfulness of the act must also be shown. A verdict that finds its only support in conjecture or speculation cannot stand.

Tingle v. U. S., 38 Fed.(2) 573;
Reavis v. U. S., 93 Fed(2) 307;
Ching Wan et al. v. U. S., 35 Fed.(2) 665;
Kassin v. U. S., 87 Fed.(2) 183;
Eng Jung v. U. S., 46 Fed.(2) 66;
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Rossi v. U. S., 49 Fed.(2) 1 (C.C.A. 9th Cir.);
Qwong Mow v. U. S., 13 Fed.(2) 121;
Nosowitz v. U. S., 282 Fed. 575;
U. S. v. DeVito, 68 Fed.(2) 837;
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U. S. v. Buchalter, 88 Fed.(2) 625, 626;
Henderson v. Commonwealth, 107 S.E. 700, 701;
Alexander v. State, 221 Pac. 516;
Ezzard v. U. S., supra;
Karchner v. U. S., 61 Fed.(2) 623;
Girgenti v. U. S., 81 Fed.(2) 741, 742;
People v. Tom Woo, supra;
People v. Rodriguez, supra;
State v. Lund, 18 P.(2) 603;

State v. McWilliams, 57 P.(2) 788;
State v. Wallette, 75 P.(2) 799;
Richards v. State, 6 P.(2) 449;
Barr v. State, 231 Pac. 322.

In *Ezzard v. U. S.,* supra, where the defendant was arrested and charged with possession of narcotics when a trunk he was transporting in his automobile was found to contain narcotics, the Court held that the evidence failed to show the defendant had knowledge of the contents of the trunk.

To sustain a conviction, it should appear not only that the offense was committed, but the evidence inculpating the defendant should do so to a degree of certainty transcending mere probability or strong suspicion.

Simpson v. City, 93 P.(2) 539;
Wheeler v. State, 94 P.(2) 9;
Bristow v. State, 94 P.(2) 254;
Dowell v. State, 94 P.(2) 956;
People v. Stanford, 100 P.(2) 796;
Starr v. State, 74 P.(2) 1174;
Saferite v. State, 93 P.(2) 762;
Young v. U. S., 48 Fed.(2) 26;
Patterson v. U. S., 222 Fed. 599.

Likewise, the mere presence of appellant at or near the scene of crime is not of itself sufficient to sustain a conviction.

Girgenti v. U. S., supra;
U. S. v. DeVito, supra;
Graceffo v. U. S., 46 Fed.(2) 852;

State v. Hood, 298 Pac. 354;
Barr v. State, supra;
U. S. v. Johnson et al., 26 Fed. 682;
Nosowitz v. U. S., supra;
Rivera v. U. S., 57 Fed.(2) 816.

Even knowledge of the commission of an illegal act is insufficient to warrant conviction. Neither knowledge on the part of a defendant of the commission of an illegal act or a passive acquiescence therein or failure to denounce it will justify a conviction.

Rudner v. U. S., 281 Fed. 251.

The general rule is that possession, to be incriminating, must be personal and exclusive.

Willsman v. U. S., 286 Fed. 852, 855.

So far as the record shows appellant never had possession of the package, nor was it ever shown to be under his control. It follows then that the statutory rule holding that when the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury, may not be invoked to sustain the verdict against him.

Willsman v. U. S., supra, page 854.

In the case of *Henderson v. Commonwealth,* supra, the court clearly defines possession. We quote briefly:

"In 3 Greenleaf's Evidence, Sec. 33, the author says:

'But to raise the presumption of guilt from the possession of the fruits of (or) the instruments of crime by the prisoner, it is necessary that they be found in his exclusive possession. A constructive possession, like constructive notice or knowledge, though sufficient to create a civil liability, is not sufficient to hold the prisoner to a criminal charge. He can only be required to account for the possession of things which he actually and knowingly possessed, as, for example, where they are found upon his person, or in his private apartment, or in a place of which he kept the key. If they are found upon premises owned or occupied as well by others as himself, or in a place to which others had equal facility and right of access, there seems no good reason why he, rather than they, should be charged upon this evidence alone.' ''

The record fails to show that the narcotics in question were in the immediate and exclusive possession of appellant and under his dominion and control.

People v. Sinclair, 129 Cal. App. 320;
People v. Herbert, 59 Cal. App. 158.

The evidence of facts are as consistent with innocence as with guilt, in the case of appellant, and is insufficient therefore to sustain the conviction.

''Unless there is substantial evidence of facts which exclude every hypothesis but that of guilt, it is the duty of the trial court to instruct the jury to return a verdict for the accused; and where all the substantial evidence is as consistent with innocence as with guilt, it is the duty of the Appellate Court to reverse a judgment of conviction.''

Willsman v. U. S., supra, page 856.

See, also,

Tingle v. U. S., supra;
Peightel v. U. S., 49 Fed.(2) 235, 240;
Ezzard v. U. S., supra, page 812;
Cox v. U. S., 96 Fed.(2) 41, 43;
Paddock v. U. S., 79 Fed.(2) 872;
Spalitto v. U. S., 39 Fed.(2) 782.

Possession of the instruments or fruits of crime by a defendant, in order to be incriminating, must have been known to him, actual, dominant, with plenary power of disposition.

Grantello v. U. S., 37 Fed.(2) 117.

The evidence offered by the prosecution being insufficient to sustain a possible verdict of guilty, the Court erred in denying appellant's motion made at the close of the prosecution's case for a directed verdict of acquittal, to which ruling appellant noted an exception (T.R. 115).

SECOND POINT RAISED: THE ARREST AND SUBSEQUENT SEIZURE WERE ILLEGAL

That the Court erred in denying defendant's petition made in writing to quash arrest and for dismissal on all the grounds urged in said written petition which was filed on April 29, 1944 (Paragraph 7, Assignment of Errors, T.R. 31).

That the Court erred in admitting in evidence during the course of the trial a package which contained the narcotics described in the indictment, which was taken by the Federal narcotic agents unlawfully and

in violation of defendant's constitutional rights under the Fourth and Fifth Amendments of the Constitution of the United States (Paragraph 8, Assignment of Errors, T.R. 31).

That the Court erred in permitting testimony to be given during the course of the trial concerning the package containing the narcotics mentioned in the preceding paragraph, said seizure being in violation of defendant's constitutional rights under the Fourth and Fifth Amendments of the Constitution of the United States (Paragraph 9, Assignment of Errors, T.R. 31).

That the Court erred in overruling defendant's repeated objections made during the course of the trial to the admission of such evidence referred to in paragraph 8 and testimony in connection therewith (Paragraph 10, Assignment of Errors, T.R. 31).

The arrest of appellant was illegal and in violation of his constitutional rights. The agents did not observe a crime being committed in their presence, nor did they have reasonable or probable cause to believe a felony had been committed by appellant to justify his arrest and the subsequent seizure of the package found to contain narcotics, which evidence was introduced in the course of the trial against appellant.

It is evident from the evidence adduced that appellant was immediately placed under arrest and prior to the discovery of the package on the floor of the garage—at least, prior to ascertaining that the package contained

narcotics. When appellant was placed under arrest in the garage, the agents had not prior thereto observed a violation of any kind.

Papani v. U. S., 847 Fed.(2) 160 (C.C.A. 9th Cir.);
Agnello v. U. S., 269 U.S. 20;
Poldo v. U. S., 55 Fed.(2) 866 (C.C.A. 9th Cir.);
Secs. 836 and 837 Calif. Penal Code (arrests);
Sec. 15 California Penal Code (crime);
U. S. v. Valisio, 41 Fed.(2) 294;
Baldocci v. U. S., 42 Fed.(2) 567;
Baumboy v. U. S., 24 Fed.(2) 512.

Illegally obtained evidence cannot be used.

Byars v. U. S., 273 U.S. 28;
U. S. v. Lefkowitz, 285 U.S. 452;
Go-Bart v. U. S., 282 U.S. 344;
Brown v. U. S., 4 Fed.(2) 246.

Appellant, after arraignment and before plea, timely filed his petition to quash arrest and for dismissal substantially on the grounds hereinabove set forth (T.R. 5). On the hearing of said petition Agent Brady testified briefly (T.R. 34). His testimony disclosed that no violation had been committed in his presence, nor was there probable cause for the arrest of appellant. The petition should have been granted and appellant discharged; instead, the Court denied the petition, to which ruling appellant noted an exception (T.R. 7).

THIRD POINT RAISED: THE TRIAL COURT ERRED IN ADMITTING DOCUMENTARY AND ORAL EVIDENCE CONCERNING THE HOSPITALIZATION AND TREATMENT OF APPELLANT AND HIS WIFE

That the Court erred in denying defendant's motion made at the close of the case to strike out all testimony of witnesses concerning the hospitalization of defendants in a sanitarium and their examination and treatment there (Paragraph 11, Assignment of Errors, T.R. 31).

That the Court erred in admitting in evidence certain records made by the witness Dr. Francis Kearney entitled "Report to Division of Narcotic Enforcement" and all testimony in connection therewith, and in refusing to strike the same from the record (Paragraph 12, Assignment of Errors, T.R. 31-32).

That the Court erred in admitting in evidence testimony of witnesses, including Dr. Francis Kearney and Ellen Jones concerning the hospitalization of defendants in a sanitarium and their examination and treatment there, and a certain admission card of W. L. Baldwin to said sanitarium and hospital records entitled "Doctor's Orders" in the cases of W. L. Baldwin and Mrs. Baldwin (Paragraph 13, Assignment of Errors, T.R. 32).

That the Court erred in admitting in evidence the documentary and oral evidence mentioned in paragraphs 11, 12 and 13 herein, on the ground that such evidence related to and directly bore upon the confidential relationship of doctor and patient and as

such were privileged discussions, communications and records (Paragraph 16, Assignment of Errors, T.R. 32-33).

Improper Cross-Examination and Rebuttal.

In rebuttal the prosecution offered evidence, documentary and oral, to show appellant and his wife, under assumed names, entered a sanitarium shortly after their arrest. A doctor and a nurse employed at the sanitarium testified appellant and his wife were admitted to the sanitarium as drug addicts and were given medical treatment ordinarily accorded drug addicts, which included the administering of narcotic drugs (T.R. 161 to 178).

The documentary evidence consisted of an admission card for appellant under such assumed name of Baldwin (T.R. 175), several report cards presumably sent by the doctor to the State Narcotic Division containing information of appellant's hospitalization and treatment at the sanitarium (T.R. 164-165) and certain hospital records covering medication and treatment of appellant and his wife at the sanitarium (T.R. 177).

Appellant objected to the admission of the doctor's report cards to the State Narcotic Division, T.R. 162, 163, 165, 166, 167) which objection was overruled and exception noted (T.R. 163, 165, 166, 167).

Appellant also objected to the admission of the above mentioned hospital records, which objection was overruled and exception noted (T.R. 177). At the close of the case appellant moved to strike from the record all testimony concerning hospitalization of appellant and his wife at the sanitarium on the ground that such evidence was

irrelevant and not connected with the issues of the case and not binding upon appellant. The motion was denied and exception noted (T.R. 182).

It is contended by appellant that such evidence should not have been admitted and was highly prejudicial to appellant. Unquestionably the jury was greatly influenced in its verdict by this line of evidence which placed appellant in a bad light before the jury. In the first trial, when such evidence was not presented, the jury failed to reach a verdict of guilty. In the second trial with this evidence offered a verdict of guilty was quickly reached. It may well have been this particular evidence which turned the scale and lost the case for appellant.

Estate of James, 124 Cal. 653, 656.

This evidence was not relevant to the issues or the charges contained in the indictment, but touched upon an entirely different and collateral matter. Whether or not appellant and his wife were accorded treatment in a sanitarium or used narcotics had no tendency to prove or disprove the charges contained in the indictment, namely, possession and transportation of narcotics at the time designated in the indictment.

Obviously this line of evidence was introduced solely for the purpose of placing appellant and his wife in a bad light and degrading and prejudicing them in the eyes of the jury. This has been held to be an improper line of procedure prejudicial to a defendant in a case and a reversible error.

Ingram v. U. S., 106 Fed.(2) 863;
People v. Vatek, 71 Cal. App. 453, 468;

People v. Kruvosky, 53 Cal. App. 744;
Estate of Gird, 157 Cal. 534, 546;
People v. Crandall, 125 Cal. 129, 133;
People v. Chin Hane, 108 Cal. 597, 606;
People v. Montezuma, 117 Cal. App. 125, 134;
Little v. U. S., 93 Fed.(2) 401, 408.

See also:

Salerno v. U. S., 61 Fed.(2) 419, 424;
Lennon v. U. S., 20 Fed.(2) 490;
Terzo v. U. S., 9 Fed.(2) 357, 358;
Berger v. U. S., 295 U.S. 78.

It is significant that the prosecution did not introduce this line of evidence in its case in chief, but waited until rebuttal to spring a surprise upon appellant that he was not prepared to meet. A witness may not be impeached by evidence of particular wrongful acts other than a conviction for a felony.

People v. Casanova, 54 Cal. App. 439, 445.

See also:

People v. Adams, 76 Cal. App. 178, 184;
People v. Jones, 78 Cal. App. 554, 559;
Calif. Code of Civil Procedure, Sec. 2051;
People v. Quinn, 111 Cal. App. 614, 617.

The Federal rule is aptly enunciated in *McKune v. U. S.,* 296 Fed. 480, 481, where the Court said:

> "It has long been settled that testimony from other witnesses of particular instances of misconduct is improper mode of discrediting, because of the confusion

of issues and waste of time that would thus be involved, and because of the unfair surprise to the witness, who cannot know what variety of false charges may be specified and cannot be prepared to expose their falsity."

See also:

Conner v. U. S., 7 Fed.(2) 313 (C.C.A. 9th Cir.).

The same rule prevails in other states. See:

Crow v. State, 230 S.W. 148 (89 Tex. Cr. 149);
Daniels v. Starnes, 61 S.W.(2d) 548;
State v. Johnson, 101 So. 250 (156 La. 875);
Cutchin v. City of Roanoke, 74 S.E. 403 (113 Va. 452);
Terry v. State, 74 So. 756 (15 Ala. App. 665);
Underwood Typewriter Co. v. Shouldis, 253 S.W. 935 (Tex. Civ. App.);
Birmingham Union R. Co. v. Hale, 8 So. 142 (90 Ala. 8);
Tarling v. People, 194 Pac. 939, 940 (69 Colo. 477).

Said the Court in the latter case:

"The objection to impeaching a witness by evidence of specific acts is that all persons can be supposed ready to defend their general reputation of veracity, if attacked, but are not prepared at all times to defend as to a specific act."

See also:

F. W. Stock & Sons v. Dellapenna, 105 N.E. 378, 379 (217 Mass. 503).

The evidence related to a purely collateral matter.

People v. Bell, 96 Cal. App. 503, 506;
People v. Vatek, supra;
People v. Williams, 52 Cal. App. 609;
People v. Chin Hane, supra;
Estate of James, supra;
People v. Montezuma, supra;
Little v. U. S., supra;
Salerno v. U. S., supra;
Lennon v. U. S., supra;
Terzo v. U. S., supra;
Berger v. U. S., supra;
Ingram v. U. S., supra.

While it may be true that appellant stated he did not use narcotics, nevertheless no objection to such irrelevant questioning was forthcoming from the prosecution (T.R. 142). On cross-examination of appellant by the prosecution, in order to lay the foundation for the introduction of the rebuttal evidence of the doctor and the nurse and the sanitarium records that the prosecution knew very well was purely collateral and had no place in the record, appellant was again asked questions by the prosecution for the purpose of eliciting answers denoting the non-use of narcotics by appellant and denying treatment for the cure of a narcotic habit (T.R. 146); whereupon the prosecution offered the evidence concerning the sanitarium in rebuttal to contradict appellant in statements made in response to questions asked by the prosecution on cross-examination.

The prosecution should not have been permitted to enter upon this line of inquiry either by way of cross-examination or the introduction of evidence on rebuttal. It touched upon purely collateral issues.

McKune v. U. S., supra;
Cohen v. U. S., 56 Fed.(2) 28;
Kaplan v. Schwartz, 41 Fed.(2) 177;
Vendetti v. U. S., 45 Fed.(2) 543;
Steen v. Santa Clara Valley Mt. L. Co., 134 Cal. 355.

Testimony educed on cross-examination respecting immaterial or collateral matter is not open to contradiction.

Kaplan v. Schwartz, supra;
U. S. v. Neverson, 12 D.C. 152;
Austin v. U. S., 4 Fed.(2) 774;
Safter v. U. S., 87 Fed. 329;
Hanover Fire Ins. Co. v. Dallavo, 274 Fed. 258;
Union Pac. Ry. Co. v. Reese, 56 Fed. 288;
Filasto v. U. S., 211 Fed. 329;
Yoder v. U. S., 71 Fed.(2) 85.

Nor was such evidence admissible for the purpose of disparaging appellant's credibility.

Cohen v. U. S., supra.

Witnesses may be contradicted only in matters that are relevant to the issue.

Yoder v. U. S., supra;
Beyer v. U. S., 282 Fed. 225.

Appellant's answer as to matter collateral to the charge against him bound the prosecution, and it was error to admit testimony to rebut his answer.

Smith v. U. S., 10 Fed.(2) 787.

Use of Fictitious Name.

It follows from the general rule also that a witness may not be impeached by showing the assumption of a fictitious name.

People v. Buyle, 22 Cal. App.(2) 143, 150.

Here the Court held:

> "A witness may not be impeached by evidence of particular wrongful acts other than a conviction for a felony. (Code Civ. Proc., Section 2051.) It follows therefore that a witness may not be impeached by showing the assumption of a fictitious name or specific acts of unchastity. (27 Cal. Jur. 133.) Therefore the Court correctly denied cross-examination as to such matters. (People v. Pappens, 5 Cal. App.(2) 544.)"

Cross-examination of a witness as to the use of an assumed name has for its purpose the degrading of the witness.

People v. Fleming, 166 Cal. 357, 381.

It cannot be said that such testimony did not injure the defendant in the minds of the jurors.

People v. Fleming, supra.

See also:

People v. Mohr, 157 Cal. 734.

Said the Court in the latter case:

> "The questions were all improper cross-examination. They were not in response to any portion of the direct examination and were obviously asked not for the purpose of discrediting the defendant as a witness but simply and solely for the purpose of reflecting upon his character as a man and creating the impression in the minds of the jurors that he was in the habit of going under assumed names, a matter 'not conducive to a good character for defendant'. (People v. Arlington, 123 Cal. 356.)"

See also:

People v. Denby, 108 Cal. 54;
People v. Adams, supra.

Privileged Communications Between Doctor and Patient.

Such evidence involved privileged communications between doctor and patient and bore on a collateral matter not within the issues of the prosecution. It was not proper impeachment. To permit such evidence is to require appellant to submit to forcible self-incrimination.

It is clear that the privileged communication between doctor and patient applies not only between the doctor but his immediate staff and the hospital. Under the California Statutes 1929, p. 380, as amended 1931, 1933, 1935 and 1937 (Deering's General Statutes, 5323) all physicians treating patients for narcotic addiction are required to report all details to the State Narcotic authorities. The privileged communication between physician and patient applies both in criminal and civil cases.

Wigmore on Evidence, 4th Ed., p. 3358.

The California Constitution grants immunity to a citizen from being a witness against himself.

Art. 1. Section 13 of *California Constitution.*

The Federal Constitution likewise grants immunity to a citizen from being a witness against himself.

Sixth Amendment of the *Federal Constitution.*

The California law provides for privileged communications between physicians and patients, and under the California law the relationship between physician and patient is privileged.

C. C. P. 1881.

THE FOURTH POINT RAISED: THE TRIAL COURT ERRED IN ADMITTING IN EVIDENCE THE EXTRAJUDICIAL ADMISSIONS AND STATEMENTS OF APPELLANT AND HIS WIFE

That the Court erred in admitting in evidence statements and admissions of defendants on the *ground* that they were illegally obtained by the authorities who did not take defendants seasonably before a United States Commissioner, and on the additional grounds that the corpus delicti had not been proved by testimony other than the extrajudicial statements and admissions of the defendants and that said statements and admissions were not part of the res gestae (Paragraph 15, Assignment of Errors, T.R. 32).

The admissions and statements of appellant and his wife were not part of the res gestae, were made in violation of appellant's constitutional rights and further were

not admissible because the corpus delicti had not been proven.

The statements and admissions of appellant were taken and made some hours after his arrest and not at the time of the arrest so as to be part of the res gestae.

The arresting officer is required to take a defendant immediately upon arrest before the nearest United States Commissioner for a hearing, commitment and bail.

18 *U.S.C.A.* 595;
U. S. v. Puleston, 106 Fed. 294;
Saunders v. U. S., 73 Fed. 782.

Statements and admissions taken from a defendant before he has been brought before a committing magistrate as required by the statute are not admissible in evidence at the trial.

U. S. v. Haupt, 136 Fed.(2) 661;
McNabb v. U. S., 318 U.S. 332;
Gros v. U. S., 136 Fed.(2) 78.

The evidence offered did not connect appellant with the commission of either of the offenses alleged in the indictment. As to him the corpus delicti had not been proven.

Statements or admissions made by a defendant are not admissible as extrajudicial statements or admissions if the corpus delicti has not been proven.

Tingle v. U. S., supra;
Forte v. U. S., 94 Fed.(2) 236;
Jordan v. U.S., 60 Fed.(2) 4;
Flowers v. U. S., 116 Fed. 241;

Pearlman v. U. S., 10 Fed.(2) 460;
Forlini v. U. S., 12 Fed.(2) 63;
Deache v. U. S., 250 Fed. 566.

Dated: San Francisco, California,
November 7, 1944.

Respectfully submitted,

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